BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICK E. MILLS	)	
Claimant	)	
	)	
VS.	)	
	)	
PRESTIGE CABINETS	)	
Respondent	)	Docket Nos. 1,046,872
	)	& 1,047,370
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 26, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,046,872, the Administrative Law Judge (ALJ) found that claimant failed to prove by a preponderance of credible evidence that he was injured in the course of his employment on July 13, 2009, and denied his request for workers compensation benefits. In Docket No. 1,047,370, the ALJ found that claimant proved that he suffered a repetitive injury to the left arm and authorized claimant's return to Dr. Robert Lieurance for additional treatment if Dr. Lieurance felt the same was appropriate. The ALJ found the record did not show that claimant was temporarily totally disabled.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 23, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests that the Board reverse the ALJ's finding that claimant failed to prove that he sustained an accidental injury arising out of and in the course of his employment with respondent on July 13, 2009. Claimant asks the Board to order respondent to provide him with medical treatment and temporary total disability benefits.

Respondent argues the ALJ correctly found that claimant's testimony was not credible and claimant did not meet his burden of proving that he suffered personal injury by accident that arose out of and in the course of his employment. Respondent further argues that if the Board finds a physical altercation transpired on July 13, 2009, claimant's refusal to submit to a drug test should operate as a bar to benefits pursuant to K.S.A. 2008 Supp. 44-501(d)(2) and (3).

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury arising out of and in the course of his employment with respondent on July 13, 2009?

(2) If so, does claimant's refusal to submit to a drug test operate as a bar to benefits pursuant to K.S.A. 2008 Supp. 44-501(d)(2) and (3)?

FINDINGS OF FACT

Claimant began working for respondent on July 26, 2007, as a utility worker. He has two workers compensation claims, which were consolidated for preliminary hearing. His first claim, Docket No. 1,047,370, is for a series of accidents that injured his left upper extremity. He claimed pain from his left arm up to his shoulder. The ALJ found that claimant proved he suffered a repetitive injury to his left arm and authorized his return to Dr. Lieurance for additional treatment. He denied claimant's request for temporary total disability benefits. That order was not appealed, and there is no issue in this appeal regarding Docket No. 1,047,370.

In Docket No. 1,046,872, claimant claims that he injured his neck, left shoulder and buttocks in an altercation with his lead worker on July 13, 2009. He testified that the lead worker pushed him to the floor and he landed on his left shoulder and neck. He felt immediate pain after he had been shoved down. He said he did nothing to provoke the lead worker, did not challenge him to a fight, and was not engaged in horseplay. He said there were witnesses to the shoving incident. When asked why the lead worker became angry, claimant testified:

> I can only try to put this in society's problem that we've got out there in the big world. This individual, being that he's a Latino in my country, which I helped give the privilege to because I served my country. I'm just saying he had a bias

> because every where he probably went everybody would be insulting him, and he was probably taking it as an insult, you know, verbal or some type of–you know, he may have experienced that other places.
>
> All I wanted to do was show him what I was doing. I'm saying I needed help. I was told they was going to get me a helper. Nobody got me a helper.[1]

Claimant denied the verbal exchange was about the lead worker stating or implying that claimant was a "lazy Marine."[2] Claimant stated, "He didn't say lazy Marine. It had nothing to do with a military aspect of that. It was just that I'm walking around and doing nothing. I'm not doing my job, let alone helping on the line."[3] Claimant admitted that the argument got pretty loud.

Claimant said that after the incident, he spoke to Gary Mattson, respondent's Senior Human Resources Manager. He testified he told Mr. Mattson that he had been shoved to the ground by the lead worker. He also spoke to Melanie,[4] the secretary in human resources, telling her he had been accosted. Claimant then testified that later that day, he told Melanie he was hurting in his shoulder and neck and wanted to get it checked. He said he told her his injuries had nothing to do with the shoving incident, however, but that he had been hurt falling off his bicycle. But he testified he lied in making that statement. Melanie called a doctor and set up an appointment for him. Claimant testified that he saw a doctor the day of the incident, but he was not asked to give a urine sample for drug testing that day. A physician' report dated July 13, 2009, indicates that claimant told the doctor a person at work lost his temper and shoved him. A Physician's Report Blank signed on July 13, 2009, shows claimant complained of pain just above his coccyx and in his left neck and upper shoulder and that he was diagnosed with left shoulder pain and contusion and had a contusion on his coccyx.[5]

Claimant went to work the next day and worked until about 30 to 45 minutes before the end of his shift. At that time, he was told to meet with Gary Mattson and two supervisors. Claimant said the conversation made him believe he was being accused of being insubordinate to the leadership. Claimant was asked by Mr. Mattson and the supervisors to submit to a urinalysis, but he refused. Because he did not take a urinalysis on July 14 as requested, he was terminated. Claimant was aware that in the event of an on-the-job accident, he would be required to take a urinalysis. However, he refused to take

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[1] P.H. Trans. at 14-15.

[2] P.H. Trans. at 23.

[3] *Id.*

[4] Claimant testified he reported the incident to Melody, but later testimony at the preliminary hearing indicates that her name was Melanie.

[5] K-WC Form G; Cl. Ex. 2.

the urinalysis on the 14th because he considered the incident to be an assault, not an accident. And he wanted to talk to a lawyer before he took any course of action.

Claimant admitted that he had anger issues on the job with some coworkers. He had been given two warnings in the past, one verbal and one written, about incidents in which he had lost his temper. The Employee Warning Notice that he signed after his second warning indicated that the next occurrence would result in termination. Claimant has not worked since July 14, 2009, when he was terminated, and at the time of the preliminary hearing was receiving unemployment benefits.

Gary Mattson testified that on July 13, 2009, claimant came into his office upset and screaming. He said that claimant said his lead worker implied that he was a lazy Marine. Claimant told Mr. Mattson that he had gotten into his lead worker's face and they had been arguing. Mr. Mattson told claimant to calm down so they could talk it out. Mr. Mattson called claimant's supervisor in, and the two of them talked to claimant, after which claimant calmed down and thought he should apologize to his lead worker because he had been disrespectful. Mr. Mattson thought the issue had been completely handled at that point. Claimant had not mentioned in this conversation that he had been injured, nor did he ask for medical treatment. Later that day, claimant again came into the human resources office, stating that he needed to fill out a workers compensation claim form. Mr. Mattson asked him what happened, and claimant told him he had been pushed down by the lead worker during their argument. Mr. Mattson then began an investigation into the incident.

The next day, July 14, Mr. Mattson completed his investigation and brought claimant into the office and gave him a written warning and a one-day suspension. He also asked claimant to submit to a post-accident urinalysis. Mr. Mattson said that it was company policy that whenever there is any type of a workers compensation issue, the employee is required to have a urinalysis. Claimant refused to have the urinalysis. Mr. Mattson told him that not having the urinalysis would be grounds for termination and asked claimant to sign a document stating that he was refusing to have the urinalysis. Mr. Mattson typed out a document stating, "On this day I refuse to take a UA for a post accident."[6] Claimant signed the document after adding: "I was assulted [*sic*] not [an] accident. And I am talking to a lawyer for advice before I do any other course of action. Respectfully submitted."[7]

Mr. Mattson said the following day, July 15, he was going to lunch with two other men. He was in the parking lot and noticed claimant pulling up. Mr. Mattson asked claimant what he was doing, and claimant said he was coming back to work because his workers compensation claim was bogus and that he had not been hurt on the job. Claimant told him that, instead, he had been injured in a bicycle accident. Claimant also told him that he was ready to take a urinalysis. Mr. Mattson told claimant that it was too

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[6] P.H. Trans. at 41.

[7] P.H. Trans., Resp. Ex. 1.

late and that he had been terminated the day before. Claimant refused to accept that and started yelling at Mr. Mattson. Later that same day, Mr. Mattson was in his office and claimant came in, slammed the door, and started quoting the Bible and asking Mr. Mattson to hold his hands. Mr. Mattson became scared and asked claimant to leave, and then he called the police. He has called the police twice since because of claimant's subsequent behavior, but no charges have been brought. Mr. Mattson said, however, that claimant has filed assault charges against the lead worker who allegedly shoved him to the floor.

Claimant was seen on September 21, 2009, by Dr. Edward Prostic at the request of claimant's attorney. Claimant told Dr. Prostic that he had injured his left shoulder and elbow in 2008 and was treated with a steroid injection to the left shoulder. Claimant told Dr. Prostic that he had a new injury on July 13, 2009, when he injured his neck and left upper extremity. After examining claimant, Dr. Prostic opined that during the course of his employment, claimant had sustained injuries to his neck and left upper extremity. He diagnosed claimant with cervical sprain and strain, rotator cuff tendinitis with possible SLAP tear, and possible radial tunnel syndrome.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

[8] K.S.A. 2008 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

Fights between coworkers usually do not arise out of employment and generally will not be compensable.[11] But if an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[12] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[13] or the employer had reason to anticipate that injury would result if the coworkers continued to work together.[14]

K.S.A. 2008 Supp. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. . . .
>
> An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. . . .
>
> (3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:
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> (A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

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[10] *Id.* at 278.

[11] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[12] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-07, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[13] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[14] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

> (B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;
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> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
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> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[16]

ANALYSIS

Claimant has given several versions of what happened at work on July 13, 2009. He initially reported the incident as an argument without mentioning being pushed or injured. He later reported being injured after being pushed, but subsequently recanted that version and said his injuries occurred when he fell from his bicycle. The lead worker, with whom claimant alleges he had the altercation, did not testify. However, claimant's supervisor, Mr. Mattson, to whom claimant reported the incident, did testify. Claimant's testimony was contradicted in part by the testimony of Mr. Mattson, but claimant's self-contradicting statements were the most damaging evidence.

The ALJ was present for the in-person testimony of both claimant and Mr. Mattson. He found claimant's testimony to be confusing and contradictory. The ALJ determined that Mr. Mattson's testimony was more credible and, based largely on credibility, found claimant failed to prove he was injured in the course and scope of employment on July 13, 2009,

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[15] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[16] K.S.A. 2008 Supp. 44-555c(k).

as alleged. After considering the testimony and exhibits, this Board Member agrees with the ALJ's conclusion.

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. The undersigned Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

Based on the record presented to date, it is more probably true than not true that claimant was involved in some kind of altercation with his lead worker on July 13, 2009. However, claimant has not met his burden of proving that he was injured as a result of that altercation.

CONCLUSION

Claimant failed to prove he sustained personal injuries by an accident that arose out of and in the course of his employment with respondent on July 13, 2009.

As a result of this finding on issue No. 1, the second issue concerning claimant's refusal to submit to a drug test is not reached.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 26, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge